Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Relay Services and	)	
Speech-to-Speech Services for	)	CG Docket No. 03-123
Individuals with Hearing and Speech	)	
Disabilities	)	

MOTION TO RESCIND VRS RATE NPRM OR, IN THE ALTERNATIVE, TO EXTEND THE COMMENT PERIOD

In November 2007, the Commission adopted a new rate methodology for video relay service ("VRS"), expressly committing to a three-year rate schedule that would be stable, predictable, and self-executing.[1] The new methodology took effect on March 1, 2008 and was scheduled to remain in effect through June 30, 2010. On May 14, 2009, however, the Commission released a one-paragraph Notice of Proposed Rulemaking (the "NPRM") that seeks comment on whether the agency should renege on its commitment

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1 *See Telecommunications Relay Servies and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Declaratory Ruling, 22 FCC Rcd 20140, ¶ 2 (2007), as corrected by Erratum, 22 FCC Rcd 21842 (2007) ("*2007 Rate Methodology Order*") (VRS compensation rates "shall be effective for the 2007-2008 through 2009-2010 Fund years"); ¶ 11 (the FCC was "particularly interested in adopting a methodology that would result in more predictability for the providers"); ¶ 47 ("These rates will be set for a three-year period"); ¶ 51 ("Commenters argue that stable pricing will give providers the opportunity to budget their costs more effectively, and provide enough stability to make long-term investments and allocate money to programs that will reduce costs in the future."); ¶ 56 ("Commenters assert that a multi-year rate provides consistency that is necessary for planning and budgeting purposes, and avoids having to possibly adjust on short notice to a lower rate. We agree, and therefore conclude that the VRS tiers and rates will be adopted for a three-year period."); ¶ 67 ("These tiers and rates shall apply through the 2009-2010 Fund year"); ¶ 72 ("At the end of the three-year period, we will reassess what the tiers and rates shall be for the ensuing three-year period."); ¶ 97 ("The VRS . . . rates shall be set for three years, subject to certain annual adjustments.").

to a three-year plan by abandoning the new methodology after only 14 months.[2] As Sorenson Communications, Inc. ("Sorenson") and others have explained, the mere release of this proposal – much less its adoption – portends dire consequences for members of the deaf and hard-of-hearing community.[3] Beyond these concerns, any decision to abandon the Commission's commitment to provide predictable payments for VRS would be arbitrary, capricious, or an abuse of discretion to the extent that decision was the result of an unforeseen and unnecessarily expedited process.[4]

To maintain its commitment to predictability in the provision of VRS and avoid harming the statutory goals of 100 percent availability and functionally equivalent service for the deaf,[5] the Commission should rescind the NPRM, and in its place initiate a new rulemaking on the appropriate long-term rate methodology to take effect after June 30, 2010. Failing that, at the very least, the Commission should extend the NPRM's initial comment period to at least 45 days, given that the deaf community, Congress, VRS providers, and other interested stakeholders, including American Sign Language interpreters, plainly have their missions, goals, jobs, and needs put at risk by the surprising and threatening content of the NPRM.

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2 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Public Notice and Notice of Proposed Rulemaking, FCC 09-39, ¶ 11 (rel. May 14, 2009) ("Public Notice" or "NPRM").

3 Letter from Sprint Nextel Corporation, Snap Telecommunications, Inc., Sorenson Communications, Inc., and Purple Communications, Inc., to Marlene H. Dortch, FCC Secretary, CG Docket No. 03-123 (May 1, 2009) ("Joint VRS Providers May 1 Letter"). Sorenson does not repeat the concerns described in this letter, but incorporates them by reference.

4 *See* 5 U.S.C. § 706(2)(A).

5 47 U.S.C. §§ 225(a)(3) & (b)(1).

I. BACKGROUND AND DISCUSSION

On May 1 of each year, the National Exchange Carrier Association ("NECA"), in its capacity as Administrator of the Interstate Telecommunications Relay Service ("TRS") Fund ("Fund"), submits to the FCC its recommendations for the per-minute compensation rates that will apply to the various forms of TRS for the forthcoming rate year, which runs from July 1 through June 30. Traditionally, the Commission has released a public notice on the very next business day, seeking comment on the rates proposed by NECA. This year, however, a radically different process has transpired.

As expected, NECA submitted its annual TRS rate filing on May 1, 2009, proposing VRS rates for 2009-2010 in accordance with the three-year plan.[6] Rather than promptly releasing a Public Notice, however, the Commission waited almost two weeks and then, on May 14, 2009, released an unprecedented hybrid document – a combination of a Public Notice *and* an NPRM. The Public Notice is unexceptional: as anticipated, it seeks comment on NECA's proposed compensation rates for the 2009-2010 rate year, as well as NECA's proposed funding requirement and carrier contribution factor for the Fund. Sorenson has no concerns about the Public Notice.

The NPRM portion of the item, however, is deeply troubling. There, the Commission proposes to abandon the three-year rate methodology for VRS after only 14 months, and in its place to establish an undefined new methodology that allegedly will be "correlate[d]" in some way to the NECA-allowed costs (which the FCC euphemistically

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6 *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, attached to letter from John A. Ricker, NECA, to Marlene H. Dortch, FCC Secretary, CG Docket No. 03-123 (May 1, 2009).

calls "actual costs") contained in NECA's May 1 submission.[7] As explained below, the phrase used in the NPRM to denote NECA-allowed costs – *i.e.*, "actual costs" – is in fact an Orwellian construct, referring not to the true actual costs of providing VRS, but rather to that portion of the costs that a VRS provider incurs to furnish its service that the FCC (and its agent NECA) have deemed to be compensable. This proposal to base rates on the artificially low NECA-allowed costs of providing VRS, if ever adopted, will almost certainly be assailed, and in all likelihood struck down, as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[8]

As an initial matter, the Commission's sole avowed reason for abandoning the three-year plan is transparently specious. Specifically, the Commission claims that it "now has the benefit of experience with two VRS rate cycles since the adoption of the *2007 TRS Rate Methodology Order*," and suggests that as a result of this new experience, it belatedly has discovered that the VRS rates adopted in 2007 may be higher than the NECA-allowed costs of providing VRS.[9] This suggestion is demonstrably false.

The historical NECA-allowed costs have always been known to the Commission, and the disparity between these artificially low costs and the VRS rate has always been known to the Commission as well. In its May 1, 2007 annual rate filing, NECA provided weighted-average NECA-allowed costs to the Commission, and actually listed eight rates that reflected those costs for 2006, as reported by providers.[10] Yet the Commission,

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7 NPRM ¶ 11.

8 5 U.S.C. § 706(2)(A).

9 NPRM ¶ 11.

10 *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate,

within months of being apprised of these data, *twice* adopted a VRS rate significantly higher than the NECA-allowed costs. First, the FCC on June 29, 2007 adopted a VRS rate of $6.644 per minute for the 2007-08 rate year, to remain in effect on an interim basis pending adoption and implementation of a new rate methodology.[11] Four months later, the Commission adopted the new three-year "tiered" methodology for VRS that remains in effect today, resulting in VRS rates ranging from $6.30 to $6.77.[12] The FCC thus has long known that the NECA-allowed costs, even adjusted for inflation, are lower than the tiered VRS rates, and therefore it is misleading for the FCC to pretend that it only recently discovered that a difference existed.

More importantly, the suggestion in the NPRM that VRS rates are supposed to be based on historical NECA-allowed costs is a red herring. In the *2006 Rate Methodology NPRM*, the Commission explicitly sought comment on whether VRS rates should be "based on actual reasonable historical costs."[13] After sixteen months of deliberation, the Commission rejected this approach, and instead decided to adopt an incentive-based methodology using "tiered rates for VRS based on the providers' *projected* costs and

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attached to letter from John A. Ricker, NECA, to Marlene H. Dortch, FCC Secretary, CG Docket No. 03-123, at 19 & Exh. 1-4b (May 1, 2007).

11 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 22 FCC Rcd 11706, ¶ 1 (2007) (extending the 2006-2007 rate of $6.644 on an interim basis for the 2007-2008 rate year).

12 *2007 Rate Methodology Order* ¶ 2. The new methodology took effect on March 1, 2008. 73 Fed. Reg. 3197, ¶ 17 (Jan. 17, 2008). After June 30, 2008, the tiered rates automatically adjusted downward to reflect a 0.5% "X factor."

13 *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8379, ¶ 29 (2006) ("*2006 Rate Methodology NPRM*") (seeking comment on whether providers "should be required to reimburse the Fund for any amount by which their payments exceed reasonable actual costs," or whether it should adopt a cost recovery mechanism "under which rates are set based on actual reasonable historical costs, thus eliminating any need for a true-up in most, if not all, cases.").

minutes of use."[14] By adopting a stable three-year methodology, the Commission decided to move away from a rate-setting scheme that involved annual, extended controversies over what costs incurred in providing VRS would be compensable, the predicted impact of changes in the Commission's rules on provider costs, and the pace of growth in VRS subscribership. Instead, the Commission chose to adopt a rate plan that would harness the providers' incentives to make ongoing gains in the efficiency of their operations, invest in new technologies that would improve the quality (and lower the per-unit cost) of VRS, and concentrate their energies on expanding the reach of VRS to the deaf community. The centerpiece of this approach was a three-year rate plan that enabled VRS providers to implement a longer term business planning cycle that was utterly impossible under the prior, year-to-year approach. This approach has advanced the statutory goal that "functionally equivalent" VRS be provided in "the most efficient manner" to all deaf ASL users.[15]

The Commission's three-year plan represented the culmination of 16 months of deliberation, based on an extensive record. Astonishingly, the Commission now plans to give the public only two weeks to comment on a proposal to resuscitate the same discredited methodology that it explicitly rejected in 2007. The arbitrariness of this approach is underscored by the absence of any new developments (and none is cited in the NPRM) that might form the basis of the reasoned explanation that an agency must present to justify an abrupt departure from prior policies.[16]

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14 *2007 Rate Methodology Order* ¶ 52 (emphasis added).

15 47 U.S.C. §§ 225(a)(3) & (b)(1); *see also 2007 Rate Methodology Order* ¶ 56 and accompanying Statement of Commissioner Jonathan S. Adelstein.

16 *See, e.g.*, *FCC v. Fox TV Stations, Inc.*, 2009 U.S. LEXIS 3297, *23-24 (2009) (agency must provide a detailed justification for an abrupt policy shift when the "new

Perhaps aware of this factual and analytical void, the Commission suggests in the NPRM that it had planned all along to modify the tiered methodology prior to the end of the three-year period. In particular, the Commission partially quotes a footnote from *2007 Rate Methodology Order* stating that providers' annual cost submissions to NECA "'will be helpful in reviewing the compensation rates . . . [adopted] and whether they reasonably correlate with projected costs and prior actual costs.'"[17] Although this footnote suggests that the FCC might "review" the VRS rates at any time, the main text of *2007 Rate Methodology Order* also makes clear that any regulatory upshot of this review, such as a reassessment of rates, would occur only after the end of the three-year VRS rate plan.[18] Indeed, the FCC repeatedly and unambiguously committed to a stable, predictable, self-executing rate schedule in which all parties would have reasonable, adequate notice of what the VRS rates would be over the course of three rate years.[19] The FCC pledged that "[a]t the *end* of the three-year period, we will reassess what the tiers and rates shall be for the ensuing three-year period."[20] It committed that a stable and predictable rate plan would remain in place for the entire multi-year rate period, supporting providers' "planning and budgeting purposes," and "avoid[ing] having to

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policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.").

17 NPRM ¶ 5 (ellipses and bracket in original) (quoting *2007 Rate Methodology Order* ¶ 46 n.141, ¶ 56 n.170).

18 The FCC necessarily would have to commence its review of VRS rates well before June 30, 2010, so as to be able to seek comment and reach a decision on any new methodology in time for it to take effect on July 1, 2010. It is thus unremarkable that the FCC would suggest that it would "review" providers' cost data during the three-year rate period.

19 *See supra* note 1.

20 *2007 Rate Methodology Order* ¶ 72 (emphasis added).

possibly adjust on short notice to a lower rate."[21] There was no suggestion that the FCC would consider revising the rates during the three-year period, and, indeed, the very footnote partially quoted by the FCC goes on to state that the cost information reviewed by the Commission would be used "to evaluate rates every three years."[22]

Given the clarity of the FCC's pronouncements in November 2007, providers undertook business plans and made investments in reliance on the settled expectation that a self-executing rate plan would remain in effect through May 30, 2010.[23] This reliance was not mere happenstance: as noted, the avowed justification for the three-year methodology was to encourage providers to make long-term investments and plans with confidence that a self-executing rate plan would be in place for at least three years. It would be the epitome of an arbitrary and capricious process for the Commission first to invite providers to rely on a stable, predictable long-term rate, but then – after little more than a year – to revert to an unstable, unpredictable short-term rate without any new facts that might justify this reversal or adequate time for the public to comment on it.

Yet this is the very course of action that the Commission proposes to undertake in the one-paragraph NPRM. To make matters worse, the NPRM seeks comment on whether to base VRS rates on "reasonable" NECA-allowed costs, but tendentiously fails to seek comment on whether new circumstances warrant revisiting the Commission's

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21 *Id.* ¶ 56.

22 *Id.* ¶ 56 n.170.

23 *See, e.g.*, Joint VRS Providers May 1 Letter at 3 (describing millions of dollars invested by Snap!VRS in reliance on the stable, three-year rate plan adopted in the *2007 Rate Methodology Order*).

decisions regarding what costs are deemed "reasonable" and hence compensable.[24] For example, although the FCC has exerted increased regulatory control over provider-distributed videophones in just the last year,[25] videophone-related costs remain non-compensable under the FCC's rules.[26] Likewise, the Commission has temporarily waived certain minimum VRS standards because providers currently lack any technically feasible means to comply with those standards. Although Sorenson and other providers have researched new technologies that could facilitate compliance with those standards, the Commission persists in classifying those R&D costs as non-compensable – even though they advance functional equivalency and hasten the day on which the temporary waivers can be terminated.

Having reopened the issue of what is a "reasonable" VRS rate for 2009-2010, the Commission at a minimum also should have reopened the issue of what costs can be counted as "reasonably" incurred in the provision of VRS. The Commission also should have sought comment on providers' true costs, and whether the VRS industry could survive a decision to base the VRS rates for 2009-2010 on the artificially low costs that the FCC currently deems compensable. Seeking comment on these matters is critical, and it borders on recklessness for the Commission to race ahead with proposals that may slash VRS rates without considering whether doing so would – as Sorenson fears – bankrupt most, if not all, VRS providers; curtail the availability of VRS to the deaf; and

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24 Courts have found that an agency action does not constitute reasoned decision-making where the agency "lacked – and balked at gathering – sufficient record evidence . . ., blind[ing] itself to the facts necessary to its statutorily mandated duty." *Cross-Sound Ferry Servs., Inc. v. ICC*, 738 F.2d 481, 484, 487 (D.C. Cir. 1984).

25 *See, e.g.*, 47 C.F.R. § 64.611(e) (regulating the customer premises equipment of VRS and IP Relay providers).

26 *2007 Rate Methodology Order* ¶ 82.

force any surviving providers to reduce their labor costs by laying off video interpreters and deaf employees.

The FCC's failure to request relevant data or seek comment on momentous issues – when combined with the other failings described above – is arbitrary, capricious, and an abuse of discretion, and only underscores the need for the Commission to rescind the NPRM in its entirety and instead to initiate a reasoned, transparent rulemaking that seeks comment on all relevant issues regarding the long-term rate methodology to take effect on July 1, 2010.

II. CONCLUSION

For the reasons stated above, the Commission should promptly rescind the May 14, 2009 NPRM and in its place release another notice that seeks comment on the appropriate long-term VRS rate methodology to take effect on July 1, 2010. In the alternative, the Commission should extend the comment period of the NPRM, giving the public at least 45 days to submit comments and 15 days to submit reply comments.

Respectfully submitted,

/s/ Regina M. Keeney

Regina M. Keeney
Richard D. Mallen
Lawler, Metzger, Milkman & Keeney, LLC
2001 K Street NW, Suite 802
Washington, DC 20006
(202) 777-7700
rmallen@lmmk.com

Counsel for Sorenson Communications, Inc.

Michael D. Maddix
Regulatory Affairs Manager
Sorenson Communications, Inc.
4192 South Riverboat Road
Salt Lake City, Utah 84123

May 19, 2009